COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

CASE OF TAHSİN ACAR v. TURKEY

(Application no. 26307/95)

JUDGMENT
(Preliminary issue)

STRASBOURG

6 May 2003

In the case of Tahsin Acar v. Turkey,

The European Court of Human Rights, sitting as a Grand Chamber composed of the following judges:

Mr L. WILDHABER, *President*,
Mr C.L. ROZAKIS,
Mr J.-P. COSTA,
Mr G. RESS,
Sir Nicolas BRATZA,
Mr A. PASTOR RIDRUEJO,
Mr L. CAFLISCH,
Mrs F. TULKENS,
Mrs V. STRÁŽNICKÁ,
Mr P. LORENZEN,
Mr M. FISCHBACH,
Mrs N. VAJIĆ,
Mr M. PELLONPÄÄ,
Mrs M. TSATSA-NIKOLOVSKA,
Mr E. LEVITS,
Mr L. GARLICKI,
Mr F. GÖLCÜKLÜ, ad hoc *judge*,

and also of Mr P.J. MAHONEY, *Registrar*,

Having deliberated in private on 29 January and 2 April 2003,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 26307/95) against the Republic of Turkey lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Mr Tahsin Acar ("the applicant"), on 29 October 1994. The applicant stated that the application was also lodged on behalf of his brother Mehmet Salim Acar[1].

2. The applicant, who had been granted legal aid, was initially represented before the Court by Mr P. Leach, a lawyer attached to the Kurdish Human Rights Project, a non-governmental organisation based in London, and subsequently by Mr K. Starmer, a barrister practising in the United Kingdom. The Turkish Government ("the Government") did not designate an Agent for the purposes of the proceedings before the Chamber

1. In the documents submitted by the parties, Mehmet Salim Acar is also referred to as Mehmet Salih Acar or as Mehmet Selim Acar.

which initially examined the case. They subsequently designated Mr E. İşcan and Mr M. Özmen as Agents when the case was referred to the Grand Chamber (see paragraph 10 below). Having originally been designated by the initials T.A. in the proceedings before the Chamber, the applicant subsequently agreed to the disclosure of his name.

3. The applicant alleged, in particular, that his brother Mehmet Salim Acar had disappeared on 20 August 1994, when he was abducted by two unidentified persons – allegedly plain-clothes police officers. The applicant complained of the unlawfulness and excessive length of his brother's detention, of the ill-treatment and acts of torture to which his brother had allegedly been subjected while in detention, and of the failure to provide his brother with the necessary medical care in detention. The applicant further complained that his brother had been deprived of the services of a lawyer and of all contact with his family. The applicant relied on Articles 2, 3, 5, 6, 8, 13, 14, 18, 34 and 38 of the Convention.

4. The Commission declared the application admissible on 30 June 1997, and transmitted it to the Court on 1 November 1999 in accordance with Article 5 § 3, second sentence, of Protocol No. 11 to the Convention, the Commission not having completed its examination of the case by that date.

5. The application was initially allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1. Mr R. Türmen, the judge elected in respect of Turkey, withdrew from sitting in the case (Rule 28). The Government accordingly appointed Mr F. Gölcüklü to sit as an *ad hoc* judge.

6. The Chamber, having decided that no hearing on the merits was required (former Rule 59 § 2 *in fine*), invited the parties to submit final written observations, a possibility of which both parties availed themselves. The parties further considered the possibility of a friendly settlement. No settlement was reached.

7. By letter of 27 August 2001 the Government requested the Court to strike the case out of its list and enclosed the text of a unilateral declaration with a view to resolving the issues raised by the applicant. The applicant filed written observations on the Government's request on 17 December 2001.

8. Following the general restructuring of the Court's Sections as from 1 November 2001 (Rule 25 § 1 of the Rules of Court), the application was assigned to the newly composed Second Section (Rule 52 § 1).

9. In a judgment of 9 April 2002 the Chamber decided, by six votes to one, to strike the application out of the list in accordance with Article 37 § 1 (c) of the Convention on the basis of the unilateral declaration made by the Government.

10. On 8 July 2002 the applicant requested that the case be referred to the Grand Chamber (Article 43 of the Convention). On 4 September 2002 a panel of the Grand Chamber decided to accept his request (Rule 73).

11. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

12. The applicant and the Government each filed a memorial on the application of Article 37 of the Convention in the case. In addition, third-party comments on this point were received from Amnesty International, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 61 § 3).

13. A hearing on the question of the application of Article 37 of the Convention took place in public in the Human Rights Building, Strasbourg, on 29 January 2003 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Mr E. İŞCAN, *Agent*,
Mr M. ÖZMEN, *Co-Agent*,
Mr H. MUTAF,
Mrs B. ARI, *Advisers*;

(b) *for the applicant*
Mr K. STARMER,
Mr P. LOWNDS, *Counsel*,
Mrs A. STOCK, *Adviser*.

The Court heard addresses by Mr Starmer and Mr Özmen, and also their replies to questions from its individual members.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

14. The applicant was born in 1970 and lives in Sollentuna (Sweden). A summary of the facts as submitted by the parties in the proceedings before the Chamber is set out below.

A. Facts as submitted by the applicant

15. The applicant's brother Mehmet Salim Acar was a farmer living in Ambar, a village in the Bismil district in south-east Turkey. On 20 August 1994, while Mehmet Salim was working in a cotton field near Ambar, a white or grey Renault car without any registration plates stopped. Two armed men in plain clothes – claiming to be police officers – got out of the car and asked Mehmet Salim to accompany them in order to help them find a field. When Mehmet Salim refused to get into the car, the two men threatened him with their weapons. They then took his identity card, tied his hands, blindfolded him, punched him in the head and stomach, forced him into their car and drove off.

16. The scene was witnessed by Mehmet Salim's son İhsan Acar, and İlhan Ezer, another farmer. After the car had driven off, İhsan ran to his home and told his mother Halise Acar what had happened, and she in turn informed the village headman. Abide Acar, Mehmet Salim's daughter, had seen her father in the back seat of a "grey-coloured" car passing through the village while she and a neighbour were washing clothes in a stream. Another villager had allegedly seen Mehmet Salim being taken to the riverbank, where five other people had been waiting in another car. Mehmet Salim's hands and feet had been tied, he had been blindfolded and his mouth had been taped. The two cars had reportedly driven off in the direction of Bismil. Nothing has been heard from Mehmet Salim since.

17. Mehmet Salim's family filed a series of petitions and complaints about his disappearance with the authorities, including the Deputy Governor and the Bismil gendarmerie, in order to find out where and why he was being detained.

18. On or about 27 August 1994 Mehmet Salim's sister Meliha Dal personally handed a written petition about her brother's disappearance to the Deputy Governor of Diyarbakır. After reading the petition and speaking to Ahmet Korkmaz, a non-commissioned officer of the gendarmerie, the Deputy Governor told her that Mehmet Salim was in the hands of the State and that there was nothing she could do for the time being.

19. When leaving the Deputy Governor's office, Meliha Dal was approached by a police officer, Mehmet Sen, who volunteered to make enquiries about her brother with a friend in the "torture place" of the Bismil gendarmerie station. This police officer rang Meliha Dal three days later and told her that he had seen Mehmet Salim at the Bismil gendarmerie command and that he could bring him some clothes and cigarettes. After Meliha Dal had fetched some clothes, the police officer told her that he would take these to her brother in one or two days' time. On 31 August 1994 the police officer called Meliha Dal again and told her that her brother had been taken away from the Bismil gendarmerie command and that he did not know where to.

20. On 29 August 1994 Hüsna Acar, Mehmet Salim's mother, filed a petition with the Bismil public prosecutor requesting an investigation of her son's disappearance.

21. By a letter of 2 September 1994 the public prosecutor requested information from the Bismil gendarmerie commander about the case. On the same day the public prosecutor took statements from Hüsna, Halise and İhsan Acar, and the farmer İlhan Ezer.

22. On 19 October 1994 Hüsna Acar asked the Bismil Chief Public Prosecutor for information about the progress of the investigation, but she received no reply.

23. In his letters of 29 November 1994 and 19 January 1995, the applicant asked the public prosecutor at the Diyarbakır National Security Court to investigate the whereabouts of his brother Mehmet Salim. These letters remained unanswered.

24. By letters of 15 March and 17 May 1995 the Bismil public prosecutor asked the Bismil gendarmerie commander for information about the case.

25. On 20 July 1995 the applicant requested the Bismil Chief Public Prosecutor for information about the case of Mehmet Salim Acar and accused the gendarmes İzzetin and Ahmet and the village guard Harun Aca of being responsible for his brother's abduction.

26. On 26 and 27 July 1995 the applicant sent letters to the Minister for Human Rights and the Minister of Justice, seeking information about his brother's whereabouts and condition. On 24 August 1995 the Minister for Human Rights informed the applicant that his petition had been transmitted to the office of the Diyarbakır Governor. In his reply of 30 August 1995 the applicant requested the Minister for Human Rights to ensure his brother's safety and to take urgent action.

27. On 21 August 1995 the Bismil public prosecutor informed the Minister of Justice that Mehmet Salim Acar had been abducted by two armed men whose identities had not yet been established.

28. On 8 September 1995 gendarmes took further statements from Hüsna, Halise and İhsan Acar.

29. On 27 September 1995 the applicant was contacted by an unknown person who asked for 1,100,000,000 Turkish liras in return for his brother's release. The applicant was told that his brother would be interrogated at the Bismil gendarmerie command and that he would be able to meet him within a week. On 5 October 1995 Mehmet Salim's family were contacted by a person called Murat, who informed them that Mehmet Salim had been detained in Bolu and subsequently at a military base. He was alive and was working as an agent for the authorities. In order to have him released, the family would have to comply with the conditions of the Diyarbakır Regiment Commander, namely to keep secret the names of those who had

abducted him, as well as the place where and the persons by whom he had been detained. The family refused to accept these demands.

30. On 25 October 1995 Meliha Dal gave a statement to the Bismil gendarmerie command to the effect that, in her opinion, the gendarmes İzzet Cural and Ahmet Korkmaz and the village guard Harun Aca were responsible for her brother's abduction.

31. On 30 October 1995 the home of Meliha Dal was raided by officers of the Diyarbakır Anti-Terrorism Branch, who threatened her with death and attempted to abduct her 12-year-old son.

32. The applicant was informed in November 1995 by the Diyarbakır general gendarmerie command that his brother had not been apprehended by the gendarmerie but had been abducted by two unidentified civilians who claimed to be policemen.

33. The applicant also filed a petition about his brother's disappearance with the Human Rights Commission of the Turkish Grand National Assembly. On 1 December 1995, in reply to a request for information, the office of the Diyarbakır Governor informed the Human Rights Commission that the case had been investigated, that the two gendarmes whose names had been given by the applicant and his sister had not apprehended Mehmet Salim, that he had been abducted by two unidentified individuals and that the investigation of the case by the Bismil public prosecutor was ongoing. This information was transmitted by the Human Rights Commission to the applicant on 18 December 1995.

34. On 10 June 1996 Hüsna Acar asked the Bismil public prosecutor for information about the investigation.

35. On 17 June 1996 the Bismil public prosecutor issued a decision of non-jurisdiction (*görevsizlik kararı*) and transmitted the investigation opened in respect of the gendarmes İzzet Cural and Ahmet Babayiğit and the village guard Harun Aca to the Diyarbakır Provincial Administrative Council (*İl İdare Kurulu*) for further proceedings under the Law on the Prosecution of Civil Servants (*Memurin Muhakematı Kanunu*).

36. On 25 November 1996 Meliha Dal requested the Diyarbakır Governor to open an investigation into Mehmet Salim's disappearance. On 10 December 1996 the applicant wrote a letter to the President of Turkey and filed a further petition with the Diyarbakır Provincial Administrative Council. On 11 December 1996 Hüsna Acar wrote a letter to the President of Turkey and to the Minister of the Interior, asking them to investigate the disappearance of her son Mehmet Salim. Both petitions were transmitted to the office of the Batman Governor.

37. On 17 January 1997 the Diyarbakır Governor informed Meliha Dal in response to her petition of 25 November 1996 that an investigation into the matter had been carried out by the Bismil Chief Public Prosecutor and that those responsible for the abduction of her brother had remained unidentified.

38. In a decision of 23 January 1997 the Diyarbakır Provincial Administrative Council decided, on the ground that there was insufficient evidence, not to take any proceedings against the two gendarmes and the village guard.

39. On 2 February 2000 at 11.00 p.m., Meliha Dal and Hüsna and Halise Acar watched a news broadcast on the NTV television channel. The newsreader announced that four persons had been apprehended in Diyarbakır, one of whom was named Mehmet Salim Acar. Pictures of the apprehended men were shown and all three of them recognised Mehmet Salim Acar. The three women continued to watch the television news all night and saw him again on the following day during the 8 a.m. television news broadcast.

40. On 4 February 2000 Meliha Dal and Hüsna and Halise Acar informed the Bismil public prosecutor in person of what they had seen. The public prosecutor telephoned the office of the Diyarbakır public prosecutor and told the women afterwards that three persons by the name of Mehmet Salim Acar had been apprehended, but that, apart from the name, the particulars of the three men did not match those of their relative.

41. Two days later the Bismil public prosecutor informed Meliha Dal that her brother had in fact been apprehended, that he was being held in prison in Muş, and that he would be released after having given a statement.

42. On 16 February 2000 Meliha Dal told the Diyarbakır public prosecutor of her sighting of her brother on television and asked the public prosecutor for information about his fate. The public prosecutor referred her to the Şehitlik police station, from where she was referred to the police headquarters for verification of the police computer records. There she was told that she would be informed about her brother and was asked to leave. She has subsequently received no further information from the police headquarters.

43. On 18 February 2000 Meliha Dal made a similar request to the office of the Diyarbakır Governor, and was again referred to the Şehitlik police station, which directed her to the Anti-Terrorism Branch, where a police officer took a statement from her and recorded her particulars. After about an hour, Meliha Dal was told that her brother had not agreed to see his family. When she refused to accept this answer and insisted on seeing him, she was asked to leave. She was informed three days later that her brother was not in fact at the Anti-Terrorism Branch. She was subsequently told to go to the prison in Muş. When she and İhsan Acar went to the prison, they were shown a person who was not Mehmet Salim Acar.

44. On 23 March 2000 three officers of the Anti-Terrorism Branch came to the home of Halise Acar and asked her for a copy of her family's entry in the population register. She was told that they were looking for Mehmet Salim Acar everywhere in Turkey and that he had not been found to be dead.

45. According to a decision of non-jurisdiction issued on 2 May 2000 by the Muş Chief Public Prosecutor, the person placed in pre-trial detention in Muş was a Mehmet Salih Acar whose year of birth and whose parents did not match the particulars of the applicant's brother.

46. On 11 May 2000 Meliha Dal filed a petition with the Diyarbakır public prosecutor seeking an investigation into the sighting of her brother Mehmet Salim Acar during the television news broadcast.

47. On 30 May 2000 the Diyarbakır Chief Public Prosecutor issued a decision not to open an investigation (*tapiksizlik kararı*) on the basis of the petition of 11 May 2000. That decision reads as follows:

> "The complainant stated in her petition that her brother had disappeared six years ago and that nothing had been heard from him since, that she recognised one of the persons shown on a news programme in February about persons apprehended during operations conducted against the terror organisation Hizbullah, that this person's name was the same as her brother's name, and that she wished to be given the opportunity to watch a video recording [of the news broadcast] so that she could identify her brother.
>
> it has been stated in the Muş Chief Public Prosecutor's decision of non-jurisdiction dated 2 May 2000 that the person detained in the province of Muş – a Mehmet Salih Acar, born in 1964 and the son of Yahya and Ayşe – is not the complainant's brother, and it appears from the above decision of non-jurisdiction and from the birth records that the person detained in Muş, who was put on trial by the Chief Public Prosecutor of the Van State National Court, is not the complainant's brother.
>
> It is therefore concluded, in accordance with Article 164 of the Code of Criminal Procedure and subject to the right of appeal, that there is no basis for pursuing the matter ..."

48. Later in 2000 Meliha Dal spoke with a prison officer in Muş Prison. The officer confirmed that he had seen Mehmet Salim Acar when he and five or six others had been apprehended and taken to Muş Prison. According to Meliha Dal, the officer's description of Mehmet Salim corresponded to her brother's appearance.

B. Facts as submitted by the Government

49. On 29 August 1994 the applicant's mother filed a petition with the Bismil public prosecutor's office requesting an investigation into the whereabouts of her son Mehmet Salim Acar, who had been kidnapped by two men.

50. The public prosecutor opened an investigation, in the course of which statements were taken from Hüsna and Halise Acar and from the two eyewitnesses of the events, İhsan Acar and İlhan Ezer.

51. İhsan Acar's statement of 2 September 1994 to the public prosecutor, which was read out to him before he signed it, reads:

> "On the day of the incident, my father and I were working in the field. When we went to sit under a tree to have lunch, İlhan Ezer, who was working in the field, joined

> us. There was a twenty-metre distance between my father and me. At this point, a grey-coloured taxi with no number plates came and stopped near my father. The persons in the car spoke with my father. I saw them take the identity cards of my father and of the person called İlhan and then return İlhan's identity card, and I saw my father get into the taxi. This taxi immediately headed towards the village of Ambar. Later, I went home and informed my mother. As I was far away, I was unable to recognise these people, but I heard that they were speaking Turkish. These people were wearing hats and glasses. That is all I know and what I have witnessed."

52. İlhan Ezer's statement of 2 September 1994 to the public prosecutor, which was read out to him before he signed it, reads:

> "On the day of the incident, while Mehmet Salih Acar and I were having lunch in the field below the village of Ambar, a Renault TX model grey taxi without number plates approached us. The persons in the car asked us to hand over our identity cards. When we refused, they forced us by saying that they were the police and that we were therefore obliged to hand over our identity cards. The persons who asked for our cards had a western accent. Both of them were about 25 or 26 years old. One of them was wearing glasses. They did not give back Mehmet Salih's identity card. They said that 'Mehmet Salih will show us someone's field and then we will send him back'. That is all I know and what I have witnessed in relation to the incident."

53. On 19 October 1994 Hüsna Acar filed another petition with the Bismil public prosecutor.

54. On 15 March 1995 the Bismil public prosecutor requested the Bismil gendarmerie command to investigate whether or not Mehmet Salim Acar had been kidnapped.

55. On 8 September 1995 gendarmes took statements from Hüsna, Halise and İhsan Acar and from İlhan Ezer. On the basis of the applicant's allegation that Mehmet Salim Acar had been taken away by two officers of the Bismil gendarmerie and a local village guard, İlhan Ezer was asked whether the persons whom he had seen worked at the Bismil gendarmerie command. He replied:

> "Those persons were not persons working at the Bismil gendarmerie command. As I have already stated above, I have not seen these persons before. Moreover, Mehmet Salim Acar did not behave as if he knew them."

56. On 17 June 1996 the Bismil public prosecutor issued a decision of non-jurisdiction and referred the case to the Diyarbakır Provincial Administrative Council. The Administrative Council appointed Sergeant İrfan Odabaş as inspector for the investigation of the applicant's allegations that his brother had been taken into detention by the gendarmerie captain İzzet Cural and NCO Ahmet Babayiğit under the guidance of the temporary village guard Harun Aca.

57. On 23 January 1997 the Provincial Administrative Council issued a decision of non-prosecution, finding that there was insufficient evidence to take proceedings against İzzet Cural, Ahmet Babayiğit or Harun Aca.

58. Mehmet Salim Acar has been included in the list of persons who are being searched for by the gendarmerie in the entire territory of Turkey, and the search for him continues.

59. The person who was apprehended and shown during a television news broadcast in February 2000 was not the applicant's brother. Several persons being held in detention have the same name as the applicant's brother. However, their dates and places of birth and particulars are different from those of the applicant's brother.

II. THE GOVERNMENT'S UNILATERAL DECLARATION

60. By a letter of 27 August 2001 the Deputy Permanent Representative of Turkey to the Council of Europe informed the Court as follows:

> "... I have the pleasure to enclose herewith the text of a declaration which the Government would be willing to make unilaterally with a view to resolving the ... application.
>
> The Government kindly requests the Court to decide that it is no longer justified to continue the examination of the application and to strike the case out of the list under Article 37 of the Convention."

The relevant parts of the appended declaration read as follows:

> "I declare that the Government of the Republic of Turkey offer to pay *ex gratia* to the applicant, Mr Tahsin Acar, the amount of 70,000 pounds sterling [in respect of] the application registered under no. 26307/95.
>
> This sum, which covers any pecuniary and non-pecuniary damage as well as costs, shall be paid in pounds sterling, free of any taxes that may be applicable and to an account named by the applicant. The sum shall be payable within three months from the date of delivery of the judgment by the Court ... This payment will constitute the final resolution of the case.
>
> The Government regret the occurrence of the actions which have led to the bringing of the present application, in particular the disappearance of the applicant's brother Mr Mehmet Salim Acar and the anguish caused to his family.
>
> It is accepted that unrecorded deprivations of liberty and insufficient investigations into allegations of disappearance constitute violations of Articles 2, 5 and 13 of the Convention. The Government undertake to issue appropriate instructions and adopt all necessary measures with a view to ensuring that all deprivations of liberty are fully and accurately recorded by the authorities and that effective investigations into alleged disappearances are carried out in accordance with their obligations under the Convention.

The Government consider that the supervision by the Committee of Ministers of the execution of Court judgments concerning Turkey in this and similar cases is an appropriate mechanism for ensuring that improvements will be made in this context. To this end, necessary cooperation in this process will continue to take place. ...”

THE LAW

I. APPLICATION OF ARTICLE 37 OF THE CONVENTION BY THE CHAMBER

61. In its judgment of 9 April 2002 the Chamber decided to strike the application out of the list in accordance with Article 37 § 1 (c) of the Convention on the basis of the Government’s unilateral declaration. The relevant passages of its judgment read as follows:

“61. The Court recalls that Article 37 of the Convention provides that it may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to one of the conclusions specified under (a), (b) or (c) of that Article.

62. Article 37 § 1 (c) enables the Court in particular to strike a case out of its list if

‘for any other reason established by the Court, it is no longer justified to continue the examination of the application’.

63. Article 37 § 1 *in fine* states:

‘However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires.’

64. The Court has examined carefully the terms of the Government’s declaration. Having regard to the nature of the admissions contained in the declaration as well as the scope and extent of the various undertakings referred to therein, together with the amount of compensation proposed, the Court considers that it is no longer justified to continue the examination of the application (Article 37 § 1 (c)).

65. Moreover, the Court is satisfied that respect for human rights as defined in the Convention and the Protocols thereto does not require it to continue the examination of the application (Article 37 § 1 *in fine*). The Court notes in this regard that it has specified the nature and extent of the obligations which arise under the Convention for the respondent State in cases of alleged disappearances (see *Kurt v. Turkey*, judgment of 25 May 1998, *Reports of Judgments and Decisions* 1998-III; *Çakıcı v. Turkey* [GC], no. 23657/94, ECHR 1999-IV; *Ertak v. Turkey*, no. 20764/92, ECHR 2000-V; *Timurtaş v. Turkey*, no. 23531/94, ECHR 2000-VI; *Taş v. Turkey*, no. 24396/94, 14 November 2000; *Çiçek v. Turkey*, no. 25704/94, 27 February 2001; *Şarlı v. Turkey*, no. 24490/94, 22 May 2001; and *Akdeniz and Others v. Turkey*, no. 23954/94, 31 May 2001).

66. Accordingly, the application should be struck out of the list."

II. PRELIMINARY ISSUE: THE SCOPE OF THE CASE

62. In his request under Article 43 of the Convention for referral of the case to the Grand Chamber of the Court the applicant submitted that the application should not be struck out on the basis of the Government's unilateral declaration and that the Court should pursue its examination of the merits of the case. According to the applicant, there were substantial grounds for holding that "respect for human rights" required the continuation of the Court's examination of the merits of the application.

63. The Court reiterates that it has full jurisdiction within the limits of the case referred to it, the compass of which is delimited by the decision on admissibility taken on 30 June 1997 by the Commission (see paragraph 4 above). Within this framework, the Court may take cognisance of all questions of fact and law arising in the course of the proceedings instituted before it (see *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, § 56, ECHR 2003-II).

64. In the particular circumstances of the present case the Court nevertheless considers it appropriate to limit the scope of its examination, at this stage of the proceedings and without prejudice to the merits, to the question whether the unilateral declaration submitted by the Government offers a sufficient basis for holding that it is no longer justified to continue the examination of the application within the meaning of Article 37 § 1 (c) of the Convention. Consequently, the parties have been requested to limit their submissions to the Grand Chamber to the question of the application of Article 37 of the Convention in the instant case.

III. APPLICATION OF ARTICLE 37 OF THE CONVENTION

A. Submissions to the Court

1. The applicant

65. The applicant requested the Grand Chamber of the Court to reject the Government's request to strike the application out on the basis of the Government's unilateral declaration. He argued, *inter alia*, that the terms of the declaration were unsatisfactory in that it made no admission of any Convention violation in the present application; that it was not admitted that his brother Mehmet Salim Acar had been abducted and detained by State agents and was to be presumed dead, in violation of Article 2 of the

Convention; that it offered no undertaking to conduct an investigation into the circumstances of his brother's disappearance, which was what was required, but only provided a generalised undertaking concerning investigations into alleged disappearances; that the payment of compensation was referred to as *ex gratia*; that it contained no acknowledgment that the Government's conduct in this case was contrary to Articles 34 and 38 of the Convention; and that it contained no acknowledgment that the unlawful abduction and "disappearance" of his brother undermined and was inconsistent with the prohibition of torture and inhuman or degrading treatment under Article 3 of the Convention.

66. The applicant emphasised that – unlike the situation in *Akman v. Turkey* (no. 37453/97, ECHR 2001-VI), which concerned an alleged instantaneous violation, namely the killing of the applicant's son by security forces – the complaints made in the present application concerned continuing violations of Articles 2, 3 and 5 of the Convention. In this connection, the applicant pointed out that the circumstances of the disappearance of his brother, whose body had never been found, had never been established by the Turkish authorities, whereas various State officials had confirmed on different occasions that his brother was being held in custody, and whereas his brother had been seen alive and in the custody of the State as late as February 2000.

67. The applicant acknowledged that there could be circumstances in which an application could be struck out under Article 37 § 1 (c) of the Convention on the basis of a unilateral declaration made by a respondent State outside the framework of friendly-settlement negotiations and without the State accepting any liability. However, this would only be acceptable if the State concerned were to undertake to provide an effective domestic remedy; in the present case, that would mean conducting an effective domestic investigation. In view of the fundamental importance of the Convention rights at issue in the present case and the limited and ambiguous nature of the Government's unilateral declaration, which failed to address the particular circumstances of the instant case in that it contained no undertaking to conduct an effective domestic investigation into the disappearance of his brother, the applicant considered that it was unacceptable to accede to the Government's request. As the declaration did not deal with the applicant's central and fundamental allegation that the Turkish authorities had failed in their general duty to secure Convention rights to individuals within their jurisdiction and to provide them with an effective means of redress, the applicant was of the opinion that "respect for human rights" for the purposes of Article 37 of the Convention required the Court to continue its examination of the merits of his application.

2. The Government

68. The Government submitted that where no agreement on a friendly settlement could be reached between the parties and the state of evidence in a case did not allow the Court to decide it in one way or the other, it should be possible for the Court to strike the application out under Article 37 § 1 (c) of the Convention provided that the respondent Government undertook measures aimed at providing redress to the applicant and at preventing the recurrence of the facts complained of, and that such measures were accepted by the Court as reasonable and objectively satisfactory from the viewpoint of respect for human rights.

69. At the oral hearing held on 29 January 2003, the Government further agreed to amend their unilateral declaration by inserting the words "such as in the present case" in the fourth paragraph, thus changing the relevant sentence to:

> "It is accepted that unrecorded deprivations of liberty and insufficient investigations into allegations of disappearance, *such as in the present case*, constitute violations of Articles 2, 5 and 13 of the Convention." (emphasis added)

70. On the basis of the contents of their unilateral declaration in conjunction with the ongoing domestic investigation into the disappearance of the applicant's brother, the Government were of the opinion that the requirements for applying Article 37 § 1 (c) of the Convention were fully met.

71. Although the Government accepted that they could reasonably be expected to undertake an effective investigation in the applicant's case – an investigation which was in fact still continuing despite the unfortunate absence of any new leads, and which would be kept open until the applicant's brother was found – they also considered that it could not be expected of them to concede, over and above the commitments undertaken in their unilateral declaration, that all violations alleged by the applicant had occurred. The Government's unilateral declaration could not, therefore, be interpreted as entailing any admission of responsibility or liability for the violation(s) of the Convention alleged by the applicant. Consequently, the payment referred to in the unilateral declaration was of an *ex gratia* nature.

3. Third-party submissions by Amnesty International

72. Amnesty International submitted that "respect for human rights as defined in the Convention", referred to in Article 37 § 1 of the Convention, required that the circumstances of the disappearance of a person and allegations of death or torture be subject to a prompt, independent and effective investigation by the domestic authorities enabling those affected to know what had happened and enabling the authorities of the State concerned to identify and prosecute those responsible. Unless such

measures were undertaken, it could not be concluded that it was no longer justified to continue the examination of an application.

73. Striking an application out under Article 37 § 1 of the Convention on the sole basis of an undertaking by a respondent State to improve procedures in future without an acknowledgment of liability and without providing an effective remedy within the meaning of Article 13 of the Convention in the particular case concerned would, in the opinion of Amnesty International, fundamentally undermine respect for human rights and be perceived, in cases concerning disappeared persons, as condoning a continuing violation of the individual applicant's human rights.

B. The Court's assessment

74. The Court observes at the outset that a distinction must be drawn between, on the one hand, declarations made in the context of strictly confidential friendly-settlement proceedings and, on the other, unilateral declarations – such as the one at issue – made by a respondent Government in public and adversarial proceedings before the Court. In accordance with Article 38 § 2 of the Convention and Rule 62 § 2 of the Rules of Court, the Court will proceed on the basis of the Government's unilateral declaration and the parties' observations submitted outside the framework of friendly-settlement negotiations, and will disregard the parties' statements made in the context of exploring the possibilities for a friendly settlement of the case and the reasons why the parties were unable to agree on the terms of a friendly settlement.

75. The Court considers that, under certain circumstances, it may be appropriate to strike out an application under Article 37 § 1 (c) of the Convention on the basis of a unilateral declaration by the respondent Government even if the applicant wishes the examination of the case to be continued. It will, however, depend on the particular circumstances whether the unilateral declaration offers a sufficient basis for finding that respect for human rights as defined in the Convention does not require the Court to continue its examination of the case (Article 37 § 1 *in fine*).

76. Relevant factors in this respect include the nature of the complaints made, whether the issues raised are comparable to issues already determined by the Court in previous cases, the nature and scope of any measures taken by the respondent Government in the context of the execution of judgments delivered by the Court in any such previous cases, and the impact of these measures on the case at issue. It may also be material whether the facts are in dispute between the parties, and, if so, to what extent, and what prima facie evidentiary value is to be attributed to the parties' submissions on the facts. In that connection it will be of significance whether the Court itself has already taken evidence in the case for the purposes of establishing disputed facts. Other relevant factors may include the question of whether in

their unilateral declaration the respondent Government have made any admission(s) in relation to the alleged violations of the Convention and, if so, the scope of such admissions and the manner in which they intend to provide redress to the applicant. As to the last-mentioned point, in cases in which it is possible to eliminate the effects of an alleged violation (as, for example, in some property cases) and the respondent Government declare their readiness to do so, the intended redress is more likely to be regarded as appropriate for the purposes of striking out the application, the Court, as always, retaining its power to restore the application to its list as provided in Article 37 § 2 of the Convention and Rule 44 § 5 of the Rules of Court.

77. The foregoing list is not intended to be exhaustive. Depending on the particulars of each case, it is conceivable that further considerations may come into play in the assessment of a unilateral declaration for the purposes of Article 37 § 1 (c) of the Convention.

78. As to whether it would be appropriate to strike out the present application on the basis of the unilateral declaration made by the Government, the Court notes in the first place that the facts are to a large extent in dispute between the parties. The applicant claimed that his brother had been abducted in 1994 by, or at least with the connivance of, State agents, that he had subsequently been detained at the hands of the State, and that no effective domestic investigation had been conducted into those claims or into the alleged sighting of his brother on television in 2000 by relatives. According to the Government, the abduction and disappearance of the applicant's brother – including the allegations made by relatives against two gendarmes and a village guard, and the subsequent alleged sighting of the applicant's brother on television – did indeed form the subject of effective and ongoing investigations by the competent authorities, albeit without any tangible results to date.

79. Secondly, although the Government on the one hand agreed to state, in their unilateral declaration, that unrecorded deprivations of liberty and insufficient investigations into allegations of disappearance, "such as in the present case" (see paragraph 69 above), constituted violations of Articles 2, 5 and 13 of the Convention, on the other hand they subsequently made firm submissions to the effect that their unilateral declaration could in no way be interpreted as entailing any admission of responsibility or liability for any violation of the Convention alleged by the present applicant, who made complaints under Articles 2, 3, 5, 6, 8, 13, 14, 18, 34 and 38 of the Convention. The Government thereby negated the admission of liability contained in their declaration.

80. Thirdly, the Court considers that *Akman*, cited above, and the unilateral declaration made in that case differ from the present case and the present unilateral declaration in a number of crucial respects.

81. To begin with, it was not disputed between the parties in *Akman* that the applicant's son had been killed by Turkish security forces. The parties

only disagreed as to whether the security forces had acted in legitimate self-defence or whether the killing had resulted from the excessive use of force by the security forces.

Furthermore, in their unilateral declaration – submitted shortly before the Court was about to take evidence itself – the Government admitted a violation of Article 2 of the Convention by conceding that the applicant's son had died as a result of the use of excessive force notwithstanding domestic legislation.

In addition, the Government undertook to issue appropriate instructions and to adopt all necessary measures to ensure that the right to life (guaranteed by Article 2) – including the obligation to carry out effective investigations – would be respected in the future and, in this connection, referred to new legal and administrative measures adopted recently, which they said had already resulted in a reduction of deaths in circumstances similar to that of the applicant's son. The Government further undertook to cooperate with the Committee of Ministers in its supervision of the execution of the Court's judgments in this and similar cases in order to ensure that improvements would be made in this context, and to provide the applicant redress in the form of a payment of 85,000 pounds sterling.

Finally, as the Court had already specified the nature and extent of the obligations arising under the Convention for the respondent State in cases of alleged unlawful killings by security forces in various other applications it had previously decided, it could be satisfied that respect for human rights as defined in the Convention did not warrant a continuation of the examination of the application.

82. In the opinion of the Court, an undisputed killing by security forces where the respondent Government have admitted that this was the result of the use of excessive force in violation of Article 2 of the Convention cannot be compared to the unresolved disappearance of a person after an abduction allegedly by, or with the alleged connivance of, State agents. In *Akman*, cited above, further investigation of the facts either by domestic authorities or by the Court was less pressing as the respondent State had already assumed liability for the killing under Article 2 of the Convention. Moreover, in connection with the execution – supervised by the Committee of Ministers – of previous judgments of the Court in several similar cases where the Court had found Turkey to be in breach of its obligations under the Convention, the Government had already adopted or undertaken to adopt specific measures designed to prevent in future the shortcomings identified by the Court.

83. In the present case, however, the unilateral declaration made by the Government does not adequately address the applicant's grievances under the Convention. No reference is made to any measures to deal with his specific complaints, the Government merely undertaking a general obligation to pursue their efforts to prevent future disappearances, without

regard to what pertinent and practicable measures might be called for in this particular case.

84. The Court accepts that a full admission of liability in respect of an applicant's allegations under the Convention cannot be regarded as a condition *sine qua non* for the Court's being prepared to strike an application out on the basis of a unilateral declaration by a respondent Government. However, in cases concerning persons who have disappeared or have been killed by unknown perpetrators and where there is prima facie evidence in the case-file supporting allegations that the domestic investigation fell short of what is necessary under the Convention, a unilateral declaration should at the very least contain an admission to that effect, combined with an undertaking by the respondent Government to conduct, under the supervision of the Committee of Ministers in the context of the latter's duties under Article 46 § 2 of the Convention, an investigation that is in full compliance with the requirements of the Convention as defined by the Court in previous similar cases (see, for example, *Kurt v. Turkey*, judgment of 25 May 1998, *Reports of Judgments and Decisions* 1998-III; *Çakıcı v. Turkey* [GC], no. 23657/94, ECHR 1999-IV; *Ertak v. Turkey*, no. 20764/92, ECHR 2000-V; *Timurtaş v. Turkey*, no. 23531/94, ECHR 2000-VI; and *Taş v. Turkey*, no. 24396/94, 14 November 2000).

85. As the unilateral declaration made by the Government in the present case contains neither any such admission nor any such undertaking, respect for human rights requires that the examination of the case be pursued pursuant to the final sentence of Article 37 § 1 of the Convention. Accordingly, the application cannot be struck out under sub-paragraph (c) of Article 37 § 1 of the Convention since the declaration offers an insufficient basis for holding that it is no longer justified to continue the examination of the application.

86. In conclusion, the Court rejects the Government's request to strike the application out under Article 37 § 1 (c) of the Convention and will accordingly pursue its examination of the merits of the case.

FOR THESE REASONS, THE COURT

1. *Rejects* by sixteen votes to one the Government's request to strike the application out of the list;

2. *Decides* by sixteen votes to one to pursue the examination of the merits of the case; and accordingly,
   reserves the further procedure and *delegates* to the President of the Court the power to fix the same if need be.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 6 May 2003.

Luzius WILDHABER
President

Paul MAHONEY
Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Mr Ress;

(b) joint concurring opinion of Sir Nicolas Bratza, Mrs Tulkens and Mrs Vajić;

(c) dissenting opinion of Mr Gölcüklü.

L.W.
P.J.M.

CONCURRING OPINION OF JUDGE RESS

1. I fully agree with the judgment in this case but would like to add some further explanations of my vote, relating to future development of the interpretation of Article 37 § 1 (c) and Article 37 § 1 *in fine*.

Among the relevant factors the Court referred to in paragraph 76 of the judgment, it mentioned the question whether the Government have made any admission in relation to the alleged violation of the Convention in their unilateral declaration and the manner in which they intend to provide redress to the applicant. In connection with elimination of the effects of an alleged violation, the Court quoted, as an example, property cases. But an undertaking to eliminate the effects of an alleged violation is even more likely and urgent in other typical situations, as for instance failure to meet the requirement of a fair procedure under Article 6 § 1, where redress might take the form of *reopening the domestic proceedings* before a national tribunal. There are quite a number of other examples where a unilateral declaration to the effect that a respondent Government admit the alleged violation of the Convention and undertake to afford redress in a manner which eliminates the effects of the violation may be acceptable under Article 37 § 1 *in fine*.

2. As the Court has underlined in paragraph 84 of the judgment, a *full admission of liability* in respect of an applicant's allegation under the Convention cannot be regarded as a condition *sine qua non* for the Court's being prepared to strike an application out on the basis of a unilateral declaration by a respondent Government. Otherwise, few Governments would be prepared to make such unilateral declarations under Article 37 § 1 *in fine*.

The Court's statement, in my view, should not be interpreted in the sense that even though a full admission of liability need not be included in a unilateral declaration, such a declaration must include at least some admission of fault. In cases of highly disputed facts, it seems to be inappropriate to expect that the parties agree as to the facts and furthermore that the Government make an admission of liability. In this situation the Court, if the circumstances so indicate, can come to the conclusion that there was a violation of the procedural requirements of Article 2 and/or Article 3 because of the lack of an effective investigation. If this cannot be established, then the Court could take evidence on its own, if there are sufficient prospects of success in such a mission. If this is not the case, then in a situation of disputed facts the case has to be decided on the basis of the *burden of proof*. In situations where persons have been abducted and possibly killed by unknown people it is for the *applicant* to establish beyond reasonable doubt that these people were State agents and that their action was therefore imputable to the State. If this can be established, then the

burden of proof would shift to the *State* which has to provide information about the whereabouts and fate of the disappeared person (see *Tanrıkulu v Turkey* [GC], no. 23763/94, §§ 94-99, ECHR 1999-IV, and *Şarlı v. Turkey*, no. 24490/94, 22 May 2001).

3. A State may, for different reasons, be prepared to make a unilateral proposal to resolve a case even if the facts are highly disputed and the burden of proof falls on the applicant or where this is at least controversial (see the argument as to the evidence and the specific circumstances of the case in paragraphs 97 and 98 of *Tanrıkulu*, cited above). The State might nevertheless be prepared to propose *ex gratia* redress under these circumstances without any admission of responsibility just to get the case resolved. Such a resolution is in the interests of human rights, in particular if the question of the burden of proof can be considered as being controversial. I would therefore not hesitate to say that in such a case respect for human rights within the meaning of Article 37 § 1 *in fine* does not necessarily require further examination of the application.

4. It is true that in the present case there were prima facie indications supporting the allegation that the domestic investigation fell short of what is necessary under the procedural obligations arising from the Convention. Therefore a statement to the effect that more should have been done in this investigation and an indication of the precise means to be envisaged in the future have rightly been required by the Court. But there are and will be other situations where even such prima facie indications do not exist and where, in my opinion, a unilateral declaration without an admission of liability might nevertheless be acceptable under Article 37 § 1 (c) and Article 37 § 1 *in fine*.

JOINT CONCURRING OPINION OF JUDGES Sir Nicolas BRATZA, TULKENS AND VAJIĆ

(Translation)

While we are fully in agreement with the Court's decision to reject the Government's request to strike the application out of the list, we should nevertheless like to express a more general reservation about the novel procedure of striking out (Article 37 § 1 (c)) on the basis of a unilateral declaration by the respondent Government even though the applicant wishes the examination of the merits of his case to be continued.

In our opinion, such a procedure must remain an exceptional one and, in any event, cannot be used to circumvent the applicant's opposition to a friendly settlement.

A careful and thorough examination is therefore necessary in each individual case. That being so, we do not consider it wise in paragraph 76 of the judgment, where the Court indicates in general terms the kind of factors that may be taken into account, to give the example of certain cases where the redress proposed by the Government would be more likely to be regarded as appropriate for the purposes of striking out the application.

DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

(Translation)

To my regret, I am unable to join the majority in rejecting the Government's request to strike the present application out of the list. The majority have also decided to pursue the examination of the merits of the case and have accordingly reserved the further procedure, a conclusion which I am likewise unable to support.

My reasons are the following.

1. By Article 37 § 1 of the Convention, the Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to one of the conclusions set out in sub-paragraphs (a), (b) or (c) of that provision. In particular, sub-paragraph (c) empowers the Court to strike out a case if "for any other reason established by the Court, it is no longer justified to continue the examination of the application".

2. Thus, the Court (Second Section), after examining carefully the terms of the Government's unilateral declaration (*T.A. v. Turkey* (striking out), no. 26307/95, § 60, 9 April 2002), considered – having regard to the nature of the admissions contained in the declaration and the scope and extent of the various undertakings referred to therein, together with the amount of compensation proposed – that it was no longer justified to continue the examination of the application (Article 37 § 1 (c)) and that the application should accordingly be struck out of the list (ibid., §§ 64 and 66). I agree entirely with that conclusion.

3. Subsequently, at the hearing of 29 January 2003 before the Grand Chamber, the Government agreed to amend their unilateral declaration in accordance with the proposal submitted to them by inserting the words "such as in the present case" in the fourth paragraph, thereby changing the relevant sentence to: "It is accepted that unrecorded deprivations of liberty and insufficient investigations into allegations of disappearance, *such as in the present case*, constitute violations of Articles 2, 5 and 13 of the Convention" (emphasis added) (see paragraph 69 of the judgment).

4. Moreover, in the fifth paragraph of their declaration the Government stated: "... the supervision by the Committee of Ministers of the execution of Court judgments concerning Turkey in this and similar cases is an appropriate mechanism for ensuring that improvements will be made in this context. To this end, necessary cooperation in this process will continue to take place. ..." The Government thus fully acknowledged and assumed the respondent State's liability under the Convention. Accordingly, the alleged differences which the majority perceived between *Akman v. Turkey* and the present case in reaching the opposite conclusion are wholly irrelevant because, as I have just indicated, in making the addition to the fourth paragraph the Government clearly admitted liability (see paragraphs 80 to

83 of the present judgment, and also the following judgments: *Akman v. Turkey* (striking out), no. 37453/97, ECHR 2001-VI; *Haran v. Turkey* (striking out), no. 25754/94, 26 March 2002; and *Toğcu v. Turkey* (striking out), no. 27601/95, 9 April 2002.

5. However, the majority of the Court, disregarding the fact that only the official written declaration submitted to the Court is authoritative and drawing unjustified inferences, expressed the opposite view and rejected the Government's request to strike the application out of the list under Article 37 § 1 (c) of the Convention. That is a conclusion which I am unable to share.

6. In the present case, it seems to me that the referral to the Grand Chamber is more akin to an appeal on points of law than to an ordinary appeal. For that reason, I do not regard the present judgment as an interlocutory decision. Accordingly, after rejecting the Government's request (in other words, after quashing the Second Section's judgment), the Grand Chamber should have remitted the case – for a fresh examination of the merits – to the section whose judgment it had just set aside instead of reserving the further procedure with a view to pursuing the examination of the merits of the case.